

These delays can not be written off to normal bureaucratic delay. Each of Sobel's unopposed license applications has been pending for at least a year, and four of them have been pending for over two years. The typical processing time for such applications is between 60 and 90 days, depending on the specific nature of the application and the size of the current processing backlog. Delays of one and two years are extremely rare, and virtually unheard of for unopposed and unconflicted applications.

The Commission has now stalled action on Sobel's finder's preference requests well beyond the reasonable time even by measure of its own performance in other cases. Sobel's three unopposed requests have now been pending for an average of 1,035 days (*i.e.*, almost three years), as follows:

Case #	Target	Date Filed	Days Pending (as of 09-Sep-96)
93F622	WNPP641	04-Oct-93	1,086
93F683	WNGH521	05-Nov-93	1,054
93F758	WNKR724	01-Feb-94	966
		Average:	1,035

When these are compared with the overall processing times for *all* finder's preference requests, the unreasonableness of this magnitude of delay on Sobel's unopposed requests becomes clear. Since 1992, the Commission has awarded a total of 422 finder's preference requests.²⁶ In the 415 cases in which there was no post-grant challenge to the Commission's action, the average processing time, from initial filing to preference award was only 198 days.²⁷ Even when the

²⁶ The averages stated above are based on the Commission's status listing of all finder's preference requests as of September 4, 1996. This list is available on the FCC's Internet site (www.fcc.gov or [ftp.fcc.gov](ftp://ftp.fcc.gov)) and a hard copy will be provided to the Court upon request. In several entries for granted or denied applications, the Commission's data lacks an entry for the action date. In those cases we have used today's date (September 24, 1996), in order to give the Commission the benefit of the doubt. Were the actual action dates known, the calculated average processing times would be even lower.

²⁷ There are at least 419 still pending finder's preference requests, and they have been on file for an average of 534 days. This is not, however, a meaningful number with which to compare Sobel's unopposed and otherwise routine requests. The Commission data provides no way to determine which pending requests are subject to other complications, but it is reasonable to assume that most are in that category insofar as all but 15 have been pending longer than the average time for action on all granted and denied requests (201 and 225 days, respectively). Even so, Sobel's requests have been awaiting action for *twice* the current average pending time.

Commission denies a request, it does so in substantially less time than the Sobel requests have been pending. In 367 denials or dismissals since 1992, the Commission acted, on average, within 208 days.

The Commission refuses to give Sobel a meaningful opportunity to address the reasons, if any, for its inaction. To the best of Sobel's knowledge, the only reason for the delay has been the Commission's alleged uncertainty about the nature and extent of the relationship between Sobel and Kay.²⁸ But the Commission has by now had more than adequate opportunity to satisfy itself on this score. The Commission has had formal discovery on the matter in the context of the Kay revocation proceeding. Sobel voluntarily provided information to the Commission on an informal basis, and offered to provide the Commission with more detailed information and even to meet with Commission staff to answer questions if that would be helpful. Rather than taking advantage of this good faith offer, the Commission instead served on Sobel (for the second time in a few short months) a formal request for information pursuant to Section 308(b) of the Communications Act—a request that Sobel answered timely and completely.

The Commission's obligations under Section 309(e) of the Communications Act are clear. The Commission must either grant the applications or, if it is unable to make the prerequisite public interest finding, it must provide a clear statement of the reasons why not and afford Sobel an opportunity to be heard on the issue or issues so stated. If, on the basis of the information it has thus far collected, the Commission has reason to believe that Sobel has acted improperly or has other bona fide questions as to his qualifications or the propriety of granting the pending applications or requests, the Commission must put the matter to Sobel and give him a meaningful opportunity to respond. The Commission's continued refusal to act is a violation of Sobel's statutory rights.

²⁸ If there is other reasons for the Commission's inaction, it has never been communicated to Sobel, formally or informally.

The Wireless Bureau may believe that any action it now takes on Sobel's applications might later prejudice it in the Kay revocation proceeding.²⁹ But leaving Sobel indefinitely in regulatory limbo can not be justified merely because the Bureau does not wish to limit its tactical options.³⁰ Sobel has repeatedly advised the Bureau that he operates separately from Kay, that his arrangements with Kay are arm's length and legitimate, and that he has operated his Title III facilities in substantial compliance with the terms of the licenses, applicable FCC regulations, and the Communications Act. Unless the Commission has reason to believe that this is not the case or otherwise has information leading it to conclude granting Sobel's applications would be "prima facie inconsistent with" the public interest,³¹ it must grant the Sobel Filings. If the Commission can not make a favorable public interest finding, it must give Sobel an opportunity to answer the charges.

If the Commission would discharge its statutory obligations, Sobel would be able to react accordingly. He would answer any legitimate issues framed by the Commission. Even if the Commission were to take an action adverse to Sobel, at least he would then have the opportunity to seek review in this Court pursuant to Section 402(b) of the Communications Act. By unreasonably withholding action, therefore, the Commission is not only denying Sobel's statutory rights, it is also improperly depriving this Court of its appellate review. Mandamus is clearly an appropriate remedy in such cases. "[B]ecause the statutory obligation of a Court of Appeals to review on the merits may be defeated by an agency that fails to resolve disputes, a Circuit Court may [pursuant to the All Writs Act] resolve claims of unreasonable agency delay in order to protect its future jurisdiction."³² "The Administrative Procedure . . . Act directs agencies

²⁹ If the Commission reverses the ALJ's summary decision and the matter returns to hearing, the Bureau may, for example, attempt to advance the theory that there has been an unauthorized *de facto* transfer of control of Sobel's licenses to Kay in violation of 47 U.S.C. § 310(d), or that the arrangements between Kay and Sobel are otherwise improper.

³⁰ The Commission could just as easily preserve its options by granting the Sobel applications conditioned on and without prejudice to any action the Commission may later deem appropriate in light of its ultimate conclusions in the Kay proceeding and its investigation of the Kay-Sobel relationship.

³¹ See 47 U.S.C. § 309(d)(1).

³² *Telecommunications Research and Action Center v. FCC*, 242 U.S. App. D.C. 222, 248, 750 F.2d 70, 76 (1984).

to conclude matters presented to them 'within a reasonable time,' 5 U.S.C. § 555(b) (1982), and stipulates that the 'reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed . . . ' 5 U.S.C. § 706(1)."³³

E. Conclusion

Sobel respectfully submits that the Commission's delay is unreasonable. The length of the delay is well beyond the time normally taken by the Commission in similar matters. Further, this is more than mere delay—it appears to be a deliberate freeze on any and all pending requests by Sobel. Yet the Commission has never issued a statement that such a freeze is in effect, much less a justification for it. The unreasonableness of the delay is underscored by the Commission's refusal to answer the numerous and repeated requests by Sobel over the last two year for either action or an explanation, and by the Commission's silence in the face of offers by Sobel to voluntarily assist the Commission in resolving any questions or issues ostensibly preventing action. By not taking action, by not providing a statement of the reasons for such inaction, and by not affording Sobel an opportunity to address whatever issues or questions are the basis for such inaction, the Commission effectively has summarily denied Sobel's applications without hearing. In these circumstances, the Court must exercise its mandamus powers to remedy this blatant violation of Sobel's statutory hearing rights and to preserve the Court's appellate jurisdiction.

³³ *Id.*

Wherefore, Petitioner respectfully requests that the Court issue a writ of mandamus providing the specific relief requested in Section C of this Petition.

Respectfully submitted,

MARC SOBEL D/B/A AIR WAVE COMMUNICATIONS

A handwritten signature in cursive script, reading "Robert J. Keller", is written over a horizontal line.

By: Robert J. Keller
His Attorney

Law Office of Robert J. Keller, P.C.
2000 L Street, N.W. - Suite 200
Washington, D.C. 20036

Telephone: 202-416-1670
Facsimile: 301-229-6875
Email: rjk@telcomlaw.com

Dated: 24 September 1996

ATTACHMENT NO. 1
FCC LICENSES HELD BY MARC SOBEL

Licenses held by Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications:

KAC8275 (GMRS)
KD53189
KE6HGO (Amateur Radio Service)
KNBT299
KRU576
WIH718
WIJ516
WIJ698
WIJ716
WIK548
WIK657
WIK833
WIL516
WIL598
WNPX844
WNPY680
WNWB334
WNXL471
WNYR424
WNZC764 (SMR end user license)
WNZJ445
WNZS492
WPAD685
WPCA891
WPCZ354
WPDB603
WPFF529
WPFH460
WPGC780

ATTACHMENT NO. 2
MARC SOBEL'S PENDING APPLICATIONS
AND FINDER'S PREFERENCE REQUESTS

PENDING FINDER'S PREFERENCE REQUESTS BY MR. SOBEL

- Case # 93F600 (preference awarded 24 February 1994 - reconsideration pending)
Target: Lance Hardy Advertising (WNYQ465)
- Case # 93F622 (filed 4 October 1993)
Target: Western Waste (WNPP641)
The target did not respond; Sobel filed a *Motion for Summary Judgment* on 6 May 1994.
- Case # 93F683 (filed 5 November 1993)
Target: Fleet Disposal, Inc. (WNGH521)
The target did not respond; Sobel filed a *Motion for Summary Judgment* on 6 May 1994.
- Case # 93F758 (filed 1 February 1994)
Target: LVJ Leasing, Inc. (WNKR724)
The target did not respond; Sobel filed a *Motion for Summary Judgment* on 29 April 1994.

PENDING APPLICATIONS BY MR. SOBEL

- File No. 670861 (filed 9 June 1994)
851.8875 MHz
- File No. 415367 (filed 18 April 1994)
507.2875 MHz
- File No. 697577 (filed 22 March 1995)
852.1625 & 852.4125 MHz
- File No. 416021 (filed 31 July 1995)
472.4125 MHz
- File No. 154618 (filed 16 May 1995)
463.675 MHz
- File No. 501542 (filed 17 April 1995)
853.1375 MHz
- File No. 686673 (filed 6 May 1994)
854.0375 MHz
- File No. 415478 (filed 16 September 1994)
471.9375 MHz

ATTACHMENT NO. 3
MARC SOBEL'S DECEMBER 6, 1996 LETTER TO FCC

Air Wave Communications

Federal Communications Commissions
1270 Fairfield Road
Gettysburg, PA 17325

Attn.: Gary Stanford

Dear Mr. Stanford,

12-6-94

It has come to my attention that several of my FCC radio station license applications, FCC radio station license application which I have prepared for my customer, and several finder's preference requests I have filed have all been placed on hold by Mr. W. Riley Hollingsworth due to an investigation that is being conducted into licenses held by Mr. James A. Kay, Jr.

I have been informed that Mr. Hollingsworth has recently stated his intent to dismiss one my radio station license applications, file #415367, if Mr. Kay fails to respond to the Commissions inquiry. See attached copy of letter dated 10/28/94 addressed to Mr. Kay. This letter to Mr. Kay improperly included the file number of my application.

Mr. Hollingsworth has also delayed or intervened with an application for the American Red Cross, Los Angeles Chapter file #129176. His request for additional information, sent to me through the processor, for a separate letter restating the number of mobiles to be placed in operation on a Business radio Service 460 MHz frequency channel seems quite unusual considering the mobile loading on these frequencies is not limited. It appears that this special handling has occurred solely due to my name appearing on the application as preparer.

I also have applied for a "finders preference" under the following file numbers:

<u>File #</u>	<u>Date filed</u>	<u>Target Licensee</u>	<u>Call Sign</u>	<u>Status</u>
93F600	08/09/93	Lance Hardy	WNYQ465	Recon - opposition filed
93F622	10/04/93	Western Waste	WNPP641	Pending - no opposition filed
93F683	11/05/93	Fleet Disposal	WNGH521	Pending - no opposition filed
93F758	02/01/94	LVJ Leasing	WNKR724	Pending - no opposition filed
94F323	07/29/94	Wilcox	WNXG598	Pending - no opposition filed

I can only assume that I have been "black listed" by Mr. Hollingsworth and am having my applications held, my customer's applications held, and my finder's preference requests ignored due to my association with Mr. Kay. Contrary to whatever beliefs that may be held by Mr. Hollingsworth, which have resulted in his taking unwarranted actions against me, I would like to assure you that I am an Independent Two Way Radio Dealer. I am not an employee of Mr. Kay's or of any of Mr. Kay's companies. I am not related to Mr. Kay in any way. I have my own office and business telephone numbers. I advertise under my own company name in the Yellow Pages. My business tax registration and resale tax permits go back to 1978 - long before I began conducting any business whatsoever with Mr. Kay - the apparent target of Mr. Hollingsworth.

I feel it is very unfair that I be punished for whatever Mr. Kay may have or may not have done, solely due to accusations against Mr. Kay.

I would be most appreciative if you investigate the mistreatment to which I am being subjected and get my applications, my customer's application and my finder's preference requests processed in a timely fashion. Should you need further assistance to assist you in this matter, please call me at your earliest convenience.

Sincerely,



Marc Sobel

ATTACHMENT NO. 4
FCC'S JANUARY 19, 1996 SEC. 308(b) REQUEST

Federal Communications Commission

1270 Fairfield Road
Gettysburg, PA 17325-7245

JAN 19 1996

VIA REGULAR & CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Marc Sobel
Air Wave Communications
15705 Superior Street
North Hills, CA 91343

Re: Request for Information
Pursuant to 308(b) of the
Communications Act

Dear Mr. Sobel:

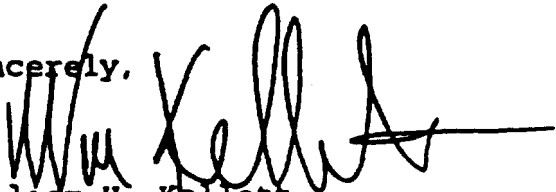
As you are undoubtedly aware, the Commission designated the licenses of James A. Kay, Jr. for hearing to resolve issues which may result in the revocation of some or all of his licenses. (See attached order.) At the time of designation, the Commission believed that because of your close business relationship with Mr. Kay, some of your licenses were in fact controlled by Mr. Kay. Mr. Kay has asserted that this was in error.

In order to expeditiously resolve this question, we request, pursuant to the authority vested in the Commission by 47 U.S.C. § 308(b) that you provide further written statements of fact including:

- 1) A list of FCC licenses held by you and/or entities in which you own an interest;
- 2) a list of end users (by call sign) operating on your stations and the number of mobile transmitters being operated; and
- 3) a written statement relating the details of your business association with Mr. Kay.

We request that you provide this information within 45 days of the date of this letter.

Sincerely,


William H. Kellett
Attorney
Office of Operations - Gettysburg

ATTACHMENT No. 5
FEBRUARY 22, 1996 LETTER FROM FCC WITHDRAWING
THE JANUARY 19, 1996 SEC. 309(b) REQUEST

Federal Communications Commission

1270 Fairfield Road
Gettysburg, PA 17325-7245

FEB 22 1996

Robert J. Keller, Esquire
Suite 200
2000 L Street, N.W.
Washington, DC 20036

Dear Mr. Keller:

This is in reference to the attached letter dated January 19, 1995, directed to Marc Sobel pursuant to 47 USC § 308(b). The request for information is withdrawn. Mr. Sobel is hereby relieved of the obligation to respond to the attached inquiry, at this time. If you have any questions, please call me at (717) 337-1311 ext. 132.

Sincerely,



William H. Kellett
Attorney
Office of Operations - Gettysburg

cc: Barry A. Friedman, Esquire

ATTACHMENT NO. 6
MARCH 18, 1996 LETTER FROM SOBEL'S COUNSEL TO FCC

Law Office
Robert J. Keller, P.C.
2000 L Street, N.W. — Suite 200
Washington, D.C. 20036

Telephone: 202.416.1670
Facsimile: 301.229.6875
Internet: rjk@telcomlaw.com

18 March 1996

William H. Kellett, Esquire
Office of Operations - Gettysburg
Wireless Telecommunications Bureau
1270 Fairfield Road
Gettysburg, PA 17325-7245

Dear Mr. Kellett:

This is in response to your letter to me dated 20 February 1996 in which you seek clarification regarding my 6 December 1995 letter notifying the Commission of my representation of Mr. Marc Sobel before the FCC. I thank you for agreeing in our telephone conversation to give me additional time to respond.

Marc Sobel has no licenses or other dealings before the FCC in any names other than Marc Sobel and/or Air Wave Communications, although that name is also sometimes been written as Airwave (*i.e.*, one word) Communications. I used the phrase "whether in the name of Airwave Communications or other trade names" because, at the time the letter was sent, I was not sure that I had yet received all of the Mr. Sobel's files from his previous counsel, and I had not yet had the opportunity to confer extensively with Mr. Sobel after reviewing his files. The wording of my letter was simply designed to cover the possibility that Mr. Sobel might have had licenses from or matters before the Commission in one or more other names. I have since verified that he does not.

I am attaching to this letter a list of the pending matters Mr. Sobel still has open before the Bureau. Most, if not all, of these items would appear to be long overdue for action. We urge prompt and timely action on these matters. Otherwise, we respectfully request that you promptly advise us of the reasons for inaction on these matters so that we may address them.

Mr. Sobel and I are continuing a review of FCC records, files in his possession, and files I received from his former legal counsel. If we discover additional pending matters, I will send you an updated listing.

Thank you for your attention to this matter.

Very truly yours,



Robert J. Keller
Counsel for Marc Sobel d/b/a Air Wave Communications

ATTACHMENT No. 7
LETTERS FROM SOBEL'S COUNSEL TO ALJ

Law Office
Robert J. Keller, P.C.
2000 L Street, N.W. — Suite 200
Washington, D.C. 20036

Telephone: 202.416.1670
Facsimile: 301.229.6875
Internet: rjk@telcomlaw.com

26 February 1996

The Honorable Richard L. Sippel
Administrative Law Judge
Federal Communications Commission
2000 L Street, N.W.
Washington, D.C. 20554

In re: WT Docket No. 94-147

Dear Judge Sippel:

In my capacity as special communications counsel to Mr. Marc Sobel, an FCC Part 90 radio licensee, I was last week served with two documents in the referenced proceeding: (1) the Wireless Telecommunications Bureau's February 22, 1996, letter asking the presiding judge to delay action on a pending *Motion for Summary Decision and Order Revoking Licenses* ("Motion"), and (2) a February 23, 1996, pleading entitled *Wireless Telecommunications Bureau's Motion for Leave to File Supplement and Supplement to Motion for Summary Decision and Order Revoking Licenses* ("Supplement"). The Supplement purports to exclude from the scope of the Bureau's pending Motion those licenses listed in Appendix A to the Order to Show Cause, Hearing Designation Order, and Notice of Hearing for Forfeiture, FCC 94-315 (December 13, 1994) that are issued to and held by Marc Sobel rather than James A. Kay, Jr., Supplement at ¶ 3, but suggests that such licenses might nonetheless be revoked after further proceedings in this hearing, *Id.*, and thus states that Marc Sobel and others "should be made parties to this proceeding and afforded the opportunity to enter formal appearances." *Id.* at n.3.

The purpose of this letter is to advise the presiding judge that we intend to respond to the Supplement insofar as it relates to Mr. Sobel no later than Tuesday, March 1, 1996. We hope this timing will not interfere with the referenced proceedings, but Mr. Sobel will require some time to absorb the Bureau's actions and statements and determine what response is necessary to protect his interests and preserve his rights in these very unusual circumstances.¹

Very truly yours,



Robert J. Keller

cc: Gary P. Schonman, Esq.
Barry A. Friedman, Esq.
Bruce Aitken, Esq.
Vida Knapp

¹ It is, to say the least, highly irregular, if not patently unlawful, for a licensee to be advised, by a footnote in a pleading filed in a proceeding that is more than a year old and to which he has never been named as a party, that the Bureau may now seek to use that proceeding as a vehicle to revoke his licenses. Cf. 47 U.S.C. § 312(c).

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Law Office
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2000 L Street, N.W. — Suite 200
Washington, D.C. 20036

Telephone: 202.416.1670
Facsimile: 301.229.6875
Internet: rjk@telcomlaw.com

27 February 1996

The Honorable Richard L. Sippel
Administrative Law Judge
Federal Communications Commission
2000 L Street, N.W.
Washington, D.C. 20554

In re: WT Docket No. 94-147

Dear Judge Sippel:

In the letter submitted yesterday on behalf of Mr. Marc Sobel, I advised you that a response to the *Wireless Telecommunications Bureau's Motion for Leave to File Supplement and Supplement to Motion for Summary Decision and Order Revoking Licenses ("Supplement")* would be filed "no later than Tuesday, March 1, 1996." That was a typographical error, and the promised date should read "Tuesday, March 5, 1996."

Very truly yours,



Robert J. Keller

cc: Gary P. Schonman, Esq.
Barry A. Friedman, Esq.
Bruce Aitken, Esq.
Vida Knapp

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Law Office
Robert J. Keller, P.C.
2000 L Street, N.W. — Suite 200
Washington, D.C. 20036

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Internet: rjk@telcomlaw.com

8 March 1996

The Honorable Richard L. Sippel
Administrative Law Judge
Federal Communications Commission
2000 L Street, N.W.
Washington, D.C. 20554

In re: WT Docket No. 94-147

Dear Judge Sippel:

This letter is to advise you that Marc Sobel will not be submitting a motion for leave to intervene or any other pleading in this proceeding at this time.

By your *Order* (FCC 96M-24; released March 1, 1996) you afforded Mr. Marc Sobel until today, March 8, 1996, to submit a motion for leave to intervene together with an attachment setting forth the pleading he would file if allowed to intervene.

Mr. Sobel had intended to follow your directive in order to present to the you and to place on the record his position that his qualifications are not at issue in this proceeding and that licenses issued to and held by him are not properly subject to revocation in this proceeding insofar as the Commission has not served Mr. Sobel with an order to show cause or otherwise afforded him any of the substantive due process rights provided for in Section 312(c) of the Communications Act. Mr. Sobel was concerned that the Wireless Telecommunications Bureau might be taking a different position based on statements in its February 23, 1996, *Motion for Leave to File Supplement and Supplement to Motion for Summary Decision and Order Revoking Licenses* ("Supplement"). After your *Order*, however, we were served with a copy of the Bureau's *Request for Certification* in which the Bureau correctly states that the order designating this proceeding did not specify issues regarding Mr. Sobel's compliance or qualifications and that Sobel's licenses should be excluded from the proceeding.

In view of the Bureau's most recent clarification of its position, Mr. Sobel no longer feels a need to respond to the *Supplement* and will not, therefore, seek to intervene in this proceeding.

Very truly yours,



Robert J. Keller
Counsel for Marc Sobel

cc: Gary P. Schonman, Esq.
Barry A. Friedman, Esq.
Bruce Aitken, Esq.
Vida Knapp

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ATTACHMENT No. 8
MAY 23, 1996 LETTER FROM SOBEL'S COUNSEL TO FCC

Law Office
Robert J. Keller, P.C.
2000 L Street, N.W. — Suite 200
Washington, D.C. 20036

Telephone: 202.416.1670
Facsimile: 301.229.6875
Internet: rjk@telcomlaw.com

23 May 1996

Via Facsimile (717-333-2698) and Regular Mail

W. Riley Hollingsworth, Deputy Chief
Office of Operations - Gettysburg
Wireless Telecommunications Bureau
Federal Communications Commission
1270 Fairfield Road
Gettysburg, PA 17325-7245

In re: Marc Sobel

Dear Mr. Hollingsworth:

On March 18, 1996, I submitted a letter (copy attached) responding to a request from William H. Kellett of your office for information regarding Mr. Marc Sobel, a Part 90 licensee. Attached to that letter is a list of pending matters Mr. Sobel has before the Commission, most, if not all, of which are long overdue for action. We requested action on those matters or, if action is not forthcoming, a statement of the nature of any problem so that it might be addressed.

When I recently inquired about the status of this request, I was advised that the Bureau might be reluctant to take any action that could be construed as a finding on Mr. Sobel's qualifications so long as the question of his status in WT Docket No. 94-147. As you are aware, on May 1, 1996, the Commission adopted an Order in WT Docket No. 94-147 in which, inter alia, it declared that Mr. Sobel is not a party to these proceedings and deleted from the scope of the designation order the call signs for stations licensed to him.

In light of the Commission's ruling, we once again urge prompt action on these matters. If the Commission has some reason for not processing Mr. Sobel's matters, it has never communicated it to Mr. Sobel so as to afford him an opportunity to address any perceived problem. You should be aware that Mr. Sobel has asked me to seek a judicial writ of mandamus if the apparent freeze on the processing of his matters is not resolved promptly. I know that neither of us wants that, so I am hopeful we can informally and expeditiously resolve these matters.

Kindly direct any questions or correspondence concerning this matter to the undersigned.

Very truly yours,



Robert J. Keller
Counsel for Marc Sobel d/b/a Air Wave Communications

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ATTACHMENT NO. 9
FCC's JUNE 11, 1996 SEC. 308(b) REQUEST